

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| PAULA PINKETT and | : | CIVIL ACTION |
| THOMAS PINKETT | : | |
| | : | |
| v. | : | |
| | : | |
| AMERICAN AIRLINES, INC. | : | NO. 99-487 |

M E M O R A N D U M

WALDMAN, J.

February 25, 1999

This is a personal injury action. Plaintiffs allege that as a result of defendant's negligence Mrs. Pinkett sustained various injuries when she fell on an icy walkway while boarding a flight at O'Hare Airport in Chicago on January 12, 1997. They allege that as a result of this accident Mr. Pinkett has suffered a loss of consortium and was required to expend funds for his wife's medical care.

Plaintiffs are citizens of New Jersey. Defendant is a corporate citizen of Delaware and Texas. This action was filed on December 15, 1998 in the Court of Common Pleas of Philadelphia and removed by defendant to this court on January 29, 1999 pursuant to 28 U.S.C. § 1441(a). Presently before the court is plaintiffs' motion to remand the case on the ground that removal was untimely. The motion was filed within thirty days of the filing of the notice of removal as required by 28 U.S.C. § 1447(c).

In its notice of removal, defendant asserts that it "was not served with a copy of the Complaint until January 27,

1999." Defendant also asserts that the "Notice of Removal has been filed within thirty (30) days upon receipt by American Airlines of information setting forth a claim for relief upon which the action is based" as required by 28 U.S.C. § 1446(b). This assertion, however, is contradicted by defendant's admission in its response to the motion for remand that defendant received a copy of plaintiffs' complaint on or just after December 16, 1998. In a letter of December 16, 1998 to defendant's claims adjuster assigned to the matter, plaintiffs' counsel made clear that the complaint had been filed the previous day and provided the court, court term, caption and civil action number.

A copy of the complaint was handed by plaintiffs' process server on December 17, 1998 to Elizabeth Carter, a sales representative at defendant's office in Philadelphia.

A notice of removal "shall be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based." See 28 U.S.C. § 1446(b). Defendant argues that Ms. Carter was not authorized to accept service of process and thus the thirty day removal period did not begin until service was effected on January 27, 1999.

A defendant, however, must file a notice of removal within thirty days of "receipt" of a copy of the initial

pleading. The plain language of § 1446(b) encompasses receipt by means other than service of process. If not, the words "or otherwise" would be meaningless.

A growing majority of the district courts and all of the Circuit Courts which have considered the issue have held that "receipt" of the initial pleading is not restricted to delivery in a manner that would constitute effective service of process. See Michetti Pipe Stringing, Inc., Murphy Bros., Inc., 125 F.3d 1396, 1398 (11th Cir. 1997); Reece v. Wal-Mart Stores, 98 F.3d 839, 841 (5th Cir. 1996); Roe v. O'Donohue, 38 F.3d 298, 303 (7th Cir. 1994); Tech Hills II Assocs. v. Phoenix Home Life Mutual Ins. Co., 5 F.3d 963, 968 (6th Cir. 1993); Rosenthal v. Life Fitness Co., 977 F. Supp. 597, 598-99 (E.D.N.Y. 1997); Ibrahim v. 1417 N Street Assoc., 950 F. Supp. 406, 407 (D.D.C. 1997); Weimer v. City of Johnstown, 931 F. Supp. 985, 989 (N.D.N.Y. 1996); Mermelstein v. Maki, 830 F. Supp. 180, 182 (S.D.N.Y. 1993) (receipt by mail of initial pleading by receptionist triggers removal period although she is not officer, managing agent or person authorized to accept service); Pillin's Place, Inc. v. Bank One, Akron, N.A., 771 F. Supp. 205, 208 (N.D. Ohio 1991) (delivery of initial pleading in manner objectively calculated to give fair notice of suit to defendant triggers removal period); Maglio v. F.W. Woolworth Co., 542 F. Supp. 39, 41 (E.D. Pa. 1982) (receipt by mail of initial pleading by a responsible employee

triggers removal period).

Defendant relies on Kelly v. Dolgen, 972 F. Supp. 1470 (M.D. Ga. 1997), Goodyear Tire & Rubber Co. v. Fuji Photo Film Co., Ltd., 645 F. Supp. 37 (S.D. Fla. 1996) and Love v. State Farm Ins. Co., 542 F. Supp. 65 (N.D. Ga. 1982) for the proposition that proper service of process is required to trigger the thirty day removal period. These cases ignore the plain language of § 1446(b) and have been overruled. See Beal Bank S.S.B. v. CJP, L.L.C., 982 F. Supp. 1469, 1471 (N.D. Ga. 1997) (Michetti Pipe directly overruled all Eleventh Circuit district courts which had adopted "proper service rule").

Some of the courts which have rejected the "proper service" interpretation have nevertheless noted the possibility of a "courtesy copy trap" in which a plaintiff's attorney mails a copy of an unfiled complaint to a defendant and then waits more than thirty days to file it in an attempt to render timely removal impossible. See e.g., Michetti Pipe, 125 F.3d at 1399. If § 1446(b) is read and applied literally, the court does not perceive such a problem. A document is not an "initial pleading" if it has not been filed. A "pleading" is a document which has been filed. See Fed. R. Civ. P. 7(a); Black's Law Dictionary 1152 (6th ed. 1990) (pleadings are "formal allegations of the parties to a lawsuit"). An action is not "based" on an unfiled draft of a complaint. There is no "action or proceeding" unless

and until one is initiated by the filing of a proper pleading with a court. In any event, there has been no such abuse in this case.

At least in a case such as this where a defendant acknowledges that it received a copy of plaintiffs' previously filed complaint sent to a responsible employee with the court name, caption, civil action number and date of filing, such receipt triggers the removal period. Thus, it is the actual receipt by defendant at its headquarters and not the handing of the complaint to its sales representative in Philadelphia that triggered the thirty day removal period. As such, whether or not service on Ms. Carter was proper is immaterial.

Accordingly, plaintiffs' motion will be granted. an appropriate order will be entered.

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O R D E R

AND NOW, this day of February, 1999, upon consideration of plaintiffs' Motion for Remand (Doc. #2) and defendant's response thereto, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and, pursuant to 28 U.S.C. § 1447(c), the above action is **REMANDED** to the Court of Common Pleas of Philadelphia.

BY THE COURT:

JAY C. WALDMAN, J.